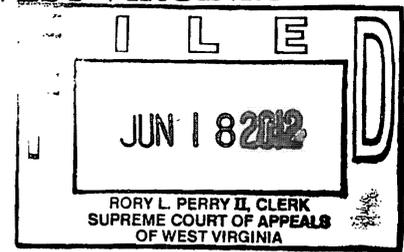


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0418



**MULTIPLEX, INC., a West Virginia corporation;
ART R. POFF; and PAMELA POFF, Petitioners**

vs.

TOWN OF CLAY, Respondent

Hon. Richard A. Facemire, Judge
Circuit Court of Clay County
Civil Action No. 10-C-82

BRIEF OF THE PETITIONERS

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in sanctioning petitioners when it ruled the preliminary injunction awarded petitioners was not obtained in bad faith. Because there is no authority for sanctioning a party who has not acted in bad faith, this Court should reverse the order of the Circuit Court and remand with directions to enter judgment for petitioners.

2. The trial court erred in entering a sanctions order without affording petitioners the right to engage in discovery; the right to the production of a copy of original invoices and payment records; and the right to an evidentiary hearing, and without making any of the required findings under *Pitrolo*. Because a party against whom sanctions is sought is entitled to these rights, this Court should reverse the order of the Circuit Court and remand for further proceedings.

3. The trial court erred in entering a sanctions order before respondent had complied with the trial court's own order to provide documentation regarding its alleged attorney fees and costs, and before the period for petitioners to respond to the special commissioner's proposed sanctions order had expired. Because the sanctions order was entered under these circumstances, this Court should reverse the order of the Circuit Court and remand for further proceedings.

4. The trial court erred in ordering the forfeiture of a \$25,000 injunction bond that does not exist and was never posted because the trial court permitted petitioners to make a cash deposit of \$2,500 to secure the preliminary injunction in lieu of a bond. Because the trial court has ordered the forfeiture of an injunction bond that does not exist, this Court should reverse and remand with directions that if any penalty be imposed on petitioners, it be limited to the \$2,500 cash deposited by petitioners to secure the preliminary injunction.

II. STATEMENT OF THE CASE

This case arises from a water project in the Town of Clay that has produced no fewer than four separate lawsuits, three of which are currently pending and one of which seeks to place the project into the receivership of the West Virginia Water Development Authority which funded the project because of the gross mismanagement of the project by the respondent, the Town of Clay [“Town”].

Petitioner, Multiplex, Inc., [“Multiplex”], is a West Virginia corporation that has been in existence for thirty years and has been involved in about 70 projects, including the construction of prisons, schools, and other public facilities. Petitioner, Art R. Poff [“Mr. Poff”], is the principal of Multiplex, and his wife, petitioner, Pamela Poff [“Ms. Poff”], is a guarantor on Multiplex’s financial obligations. The respondent Town awarded the contract for construction of the water treatment plan to Multiplex.

On December 3, 2010, petitioners filed an action arising from alleged breaches of the Town’s contractual obligations. App. 6-186. The construction contract provides that Boyles & Hildreth [“Hildreth” or “Engineer”] serve as Engineer for the project, with such rights and responsibilities as provided in the contract documents. App. 8, Complaint at ¶ 10. The contract also provides that clarifications and interpretations of the contract documents shall be issued by the Engineer. App. 4, Complaint at ¶ 14.

On September 15, 2010, pursuant to the contract, Multiplex advised the Town and the Engineer, in writing, of various items of work undertaken, additional costs, and delays incurred under the contract. App.9, Complaint at ¶ 17. The total amount past due and owing for these items, according to the calculations of Multiplex, was \$383,442.65. Id. The correspondence

dated September 15, 2010, also sought answers from the Engineer, pursuant to the contract, so that Multiplex could move forward with completion of the project. *Id.*

On October 1, 2010, Multiplex again advised the Town and the Engineer, pursuant to the contract, that it needed answers to a number of questions concerning clarification and interpretation of the contract before it could move forward with substantial completion of the work and its obligations under the contract. App. 9, Complaint at ¶ 18. Because no additional work could be completed without the Engineer's performance of its contractual obligations, Multiplex thereafter advised the Town and Engineer that no additional work could be performed without resolution of the questions pending before the Engineer. App. 10, Complaint at ¶ 19.

After receiving no response, Multiplex notified the Town and the Engineer by letter dated October 22, 2010, of claims asserted pursuant to the contract. App. 9, Complaint at ¶ 16. Thereafter, rather than providing the information requested in order to proceed with the work under the contract, the Town advised Multiplex by letter dated November 16, 2010, that it intended to declare Multiplex in default of the contract. App. 10, Complaint at ¶ 21.

Two days later, on November 18, 2010, a meeting was held between the Town and Multiplex as required by the contract, and Multiplex offered to return to work if the Engineer would provided the requested information in accordance with the terms of the contract, but that information was not provided. App. 10, Complaint at ¶ 24. Faced with the impending declaration of default even though Multiplex could not proceed with work until the Engineer responded to questions concerning how construction could be completed, suit was filed.

As noted in the complaint, the contract directs that Multiplex seek interpretation of the contract from the Engineer. App. 11, Complaint at ¶ 26. The contract directs that the Engineer will with reasonable promptness render a written decision on any issue. App. 11, Complaint at ¶

27. The contract provides that the Town and Multiplex shall execute appropriate change orders covering changes in work ordered by the Town or agreed to by the parties or which embody the substance of any written decision rendered by the Engineer, and that Multiplex could stop or terminate work if the Town failed to pay. App. 11-12, Complaint at ¶¶ 28 and 32..

Because the Town and Engineer failed to respond to inquiries regarding interpretation of the contract and failed to execute necessary change orders for work to be completed, Multiplex was unable to proceed with construction. App. 11-12, Complaint at ¶¶ 30 and 31. Accordingly, Multiplex sought an order enjoining the Town from declaring a default and ordering it to issue the requested change orders and respond to pending inquiries that would allow Multiplex to proceed with completion of the project. App. 13, Complaint at ¶ 40.

On December 7, 2010, the Circuit Court conducted a hearing on the request by Multiplex for a preliminary injunction. App. 187-236. At this hearing, the Circuit Court heard many of the same arguments made in the Town's motion for sanctions. In the end, however, the Circuit Court issued a preliminary injunction enjoining the Town from declaring a default until a hearing could be conducted on the contract claims by Multiplex. App. 221.

At the hearing, petitioners requested that, pursuant to the terms of the contract, mediation be conducted by the American Arbitration Association. App. 222. The Town, however, opposed mediation and even argued to the Circuit Court that it lacked jurisdiction to order mediation. App. 223. Ultimately, however, with respect to the issues pending in this action, this Circuit Court adopted the position of petitioners, rejected the position of the Town, and ordered that mediation be conducted. App. 227-229.

The Circuit Court also scheduled a hearing on the remaining claims of Multiplex under the contract for January 27, 2011. App. 228. With respect to securing the preliminary

injunction, the Circuit Court allowed it to be secured by a cash payment of \$2,500. App. 230-232.

On January 10, 2011, the Circuit Court ordered that mediation be conducted on January 18, 2011. App. 298-299. Moreover, on January 13, 2001, the Circuit Court entered an order cancelling the January 27, 2011, hearing and, instead, appointed a special commissioner to conduct any hearing and issue a recommended decision. App. 300.

The parties engaged in mediation beginning on January 18, 2011, and because it appeared that there might be a reasonable prospect for resolution of the matter, petitioners decided to agree to withdraw of the injunction, preserving their right to reinstitute their suit if the matter could not be resolved. Accordingly, on January 21, 2011, the Circuit Court entered an order dismissing this case as follows: “Accordingly, Plaintiffs’ request for a preliminary injunction is hereby dismissed WITH PREJUDICE; all other claims and remedies are hereby dismissed WITHOUT PREJUDICE.” App. 309-310.

So, in summary, on December 7, 2010, the Circuit Court issued a preliminary injunction against the Town to preclude it from declaring Multiplex in default until mediation and, if necessary, a further hearing could be conducted. The parties attempted mediation on January 18, 2011, and petitioners decided to voluntarily withdraw the preliminary injunction in an effort to either reach a settlement or pursue their damages claims. And, on January 21, 2011, *only 45 days after it was issued*, the preliminary injunction was dissolved *expressly preserving petitioners’ right to pursue its claims against the Town for damages*.

At that point, petitioners assumed the litigation was over and that the parties would proceed to attempt to resolve the dispute, but that if a resolution could not be found, petitioners would proceed with their claims as preserved in the Circuit Court’s order. And, indeed, the other

two defendants in this suit, the Engineer and the Surety, who had also been enjoined, voluntarily dismissed themselves from any further proceedings. App. 525-526.

On January 25, 2011, however, only four days after entry of the Circuit Court's order dismissing the case without prejudice for petitioners to pursue their damages claims against the Town, the Town filed its motion seeking forfeiture of the injunction bond; attorney fees, costs, and sanctions; and an evidentiary hearing. App. 313-382

In its motion for sanctions, the Town requested an evidentiary hearing. App. 326. In a report dated April 22, 2011, by the special commissioner appointed by the Circuit Court to conduct proceedings and make recommendations on the motion for sanctions, he stated, "We held a hearing on April 12, 2011, where we refined the issues and set a schedule for an evidentiary hearing on the motion for forfeiture of bond and sanctions." App. 527. Finally, throughout the proceedings, petitioners requested an evidentiary hearing. No evidentiary hearing, however, was ever conducted.

In addition to the absence of any evidentiary hearing, petitioners were never permitted to engage in any discovery on respondent's motion. Again, this occurred despite the statement in the special commissioner's report that "Multiplex is expected to argue that it might need discovery from some of these witnesses, or on some of the documents involved in discovery." App. 28. Indeed, petitioners had already filed a response to the motion for sanctions in which it noted, "[I]f the Town intends to introduce evidence, such as the documents attached to its motion, and ask the Court to make findings of fact, plaintiffs are entitled to complete their own discovery and present their evidence to refute the Town's allegations. See *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997)." App. 396.

Accordingly, on May 20, 2011, petitioners served written discovery on respondent,¹ seeking information on the factual allegations made in support of respondent's motion for sanctions, which primarily involved respondent's attacks on the financial viability of Multiplex; information on the testimony and evidence the respondent intended to offer at the contemplated evidentiary hearing; documentation regarding the attorney fees and costs allegedly incurred by respondent; and information related to the relevant factors for the award of attorney fees under Syllabus Point 4 of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). App. 543-575. Despite petitioners' entitlement to such discovery, however, the respondent simply refused to respond to these discovery requests and the special commissioner refused to compel those responses.

In lieu of discovery or an evidentiary hearing, the special commissioner allowed the Town to substantiate its motion through a long series of various proffers which (1) included documents that clearly had been fabricated for purposes of respondent's motion; (2) never included copies of the originals of any invoices or payment records; and (3) never included discovery or an evidentiary hearing on respondent's substantive arguments.

For example, in respondent's initial "proffer" served on October 14, 2012, no invoices or payment records reflecting the payment of any attorney fees were tendered. Rather, all that was submitted was a "Summary of Invoices" that included periods after the injunction was

¹ Again, not only did petitioners request an evidentiary hearing, respondent also requested an evidentiary hearing in its own motion. Indeed, petitioners served their discovery requests at a time when the special commissioner had indicated that an evidentiary hearing would be conducted. Moreover, after respondent had make partial disclosures of the witnesses and evidence it intended to offer at the anticipated evidentiary hearing, petitioners filed an objection to the conducting of the evidentiary hearing without responses to petitioners' written discovery requests. App. 534-602. Attached to that objection are the discovery requests served on respondent which were never answered. App. 543-575.

voluntarily dismissed. App. 624. For obvious reasons, petitioners objected to this “proffer” noting that nothing had been submitted which complied with the *Pitolo* decision. App. 764-769.

Moreover, because the special commissioner refused to compel the Town to answer petitioners’ written discovery requests under *Pitolo*, petitioners made a request of the Town under the Freedom of Information Act for a copy of the original invoices and payment records, but the Town denied petitioners’ request claiming that original invoices and payment records which in the Town’s possession which are clearly public records subject to the Freedom of Information Act are somehow protected by the attorney/client privilege. App. 940-941. Consequently, the Town refused to produce copies of the original invoices and payment records claiming attorney/client privilege. App. 943-945.

There were several reasons petitioners were very suspicious about the fees and costs being claimed by respondent to have been associated with the preliminary injunction. First, there had been a good deal of wrangling between Multiplex and the Town prior to Multiplex’s filing suit because the Town’s attorney had directed the Engineer at a meeting required by the contract not to answer the Multiplex’s questions which was also required by the contract, and the Town was certainly not entitled to fees and costs incurred prior to the filing of suit. Second, the preliminary injunction was only in place for a period of 45 days and the Town was independently seeking delay damages under the contract both of Multiplex and its Surety for the same period of time and, accordingly, a double or triple recovery of its alleged “damages” for the period of the preliminary injunction. Third, the initial proffer by the Town listed invoices for periods well after petitioners voluntarily dismissed the preliminary injunction. Fourth, petitioners had been advised by the Surety’s counsel that the Town was also seeking attorney fees and costs from the

Surety and was refusing to provide the same documentation requested by petitioners making it appear that the Town was seeking a double recovery of its attorney fees and costs. Fifth, it is common in cases in which fees and costs are being sought for the movant to produce original redacted invoices and payment records and yet the Town was adamantly opposing their production both to the Surety and Multiplex. Finally, the Town's mismanagement was spawning a multitude of lawsuits in which substantial fees and costs would appear to have been generated and it was possible that funds set aside for construction of the water treatment plant had been improperly diverted.

Rather than resolving these issues, however, the special commissioner circumvented the discovery and evidentiary hearing process and issued a report simply allowing the Town to make an additional evidentiary proffer regarding its damages. App. 1022-1031. What the Town then submitted, however, were what can only be described as fabricated invoices that were represented as redacted copies of the originals, but were addressed to "Mayor Ryan Clifton" who would not become mayor until about six months after the date of the invoices. App. 1045, 1049, 1053, 1057, 1060. Moreover, not a copy of a single check indicating that these fabricated invoices were actually paid was submitted.

Obviously, in their response to the Town's supplemental proffer, petitioners noted the fabricated nature of these invoices and argued:

One of the reasons that discovery and an evidentiary hearing are so critical to affording litigants their right to due process is that it allows parties' allegations and contentions to be tested against reality. . . .

So, plaintiffs served the Town with discovery requests exploring issues such as: (a) What rates were used by the Town's attorney? (b) What services were performed by the Town's attorney? (c) What expenses are included? (d) What court costs are included? (e) Why are plaintiffs responsible for invoices dated February 3, 2011,

and March 31, 2011, for fees, expenses, and costs when the injunction was withdrawn on January 21, 2011? . . .

Yet, the Town refused to answer these basic discovery requests and the Special Commissioner refused to order it to respond. . . .

When the Surety, likewise, asked the Town to substantiate its claim for reimbursement for attorney fees and expenses (which plaintiffs believe overlap with the attorney fees and expenses requested in this proceeding), the Town likewise refused to respond. . . .

When plaintiffs, in desperation, sent FOIA requests to the Town attempting to get answers to basic questions regarding the what, when, who, why, and how of the Town's attorney fees and expenses, the Town continued to stonewall plaintiffs' efforts. . . .

Finally, when the Special Commissioner ultimately gave the Town a second deadline to submit some documentation in support of its attorney fees and expenses, it submitted *fictitious* invoices. . . .

App. 1099-1101 (emphasis in original).

After receiving a special commissioner's report and proposed order making findings of fact and conclusions of law before, even according to the special commissioner, the parties had tendered their evidence and argument, and without affording petitioners the rights to discovery and an evidentiary hearing, petitioners filed objections to the special commissioner's report and proposed order, asking that the Town be compelled to answer petitioners' discovery requests and that the special commissioner be dismissed and the matter taken over by the Circuit Court in light of what had transpired. App. 1494-1624. The petitioners' objections and motions, however, were simply ignored.

Instead, the Town was permitted for the third or fourth time, to unilaterally submit documents, not subject to any cross-examination and not including any payment records, claiming that the previous submission of obviously fictitious invoices was some sort of "software" issue, App. 1635-1639, as if the alleged "software" problem could not have been

easily avoided by simply photocopying either the copy of the original invoices in the Town's files or in its attorney's files.

What occurred thereafter can only be described as bizarre.

On February 1, 2012, the Circuit Court entered an order, apparently in light of the dispute over the Town's purported attorney fees and costs, giving the Town until February 24, 2012, to submit "a complete list of damages," and giving petitioners until March 12, 2012, to "submit its response or objections to such damages." App. 1735.

On February 14, 2012, the special commissioner submitted yet another report, even though the parties were operating under the Circuit Court's February 1, 2012, scheduling order. App. 1747-1754.

On February 15, 2012, the following day, petitioners filed their objections to this report, noting that (1) there were outstanding discovery requests which the Town refused to answer and the special commissioner refused to compel; (2) they had served Freedom of Information Act requests on the Town which it refused to answer wrongfully based on attorney/client privilege; (3) it appeared that the Town was seeking to recover duplicative fees and costs from third-parties; (4) they had never been provided copies of the original invoices or cancelled checks or advised as to why the same do not exist; (5) and the special commissioner's report and recommended order were inconsistent with the Circuit Court's order of February 1, 2012. App. 1755-1763.

On that same day, however, February 15, 2012, *while the Circuit Court's own scheduling order was still in effect*, the Circuit Court entered a two-page order making no separate findings of fact or conclusions of law or analysis under *Pitrolo*, but awarded the Town the proceeds of a

\$25,000 injunction bond which does not exist and directed that petitioners pay \$9,344.05 to the special commissioner. App. 1765-1766.²

The Circuit Court's order, prepared by the special commissioner, did incorporate the special commissioner's first report, but that report (1) references no legal authority other than *Pitrolo*³ and (2) makes none of the findings required under *Pitrolo*. App. 1022-1031. Moreover, in the Circuit Court's own order entered on February 1, 2012, which was prepared by the special commissioner, it states: "Multiplex has not been shown to have acted in bad faith." App. 1735. Obviously, petitioners are perplexed as to how they have been "sanctioned" to the tune of nearly \$30,000 when they won every battle and were found not to have acted in bad faith.

Consequently, both procedurally and substantively, the Circuit Court's order should be set aside and either (1) judgment entered in favor of petitioners or (2) the case remanded with directions for further proceedings.

III. SUMMARY OF ARGUMENT

The Circuit Court has entered an order awarding the proceeds of a \$25,000 injunction bond that does not exist in order to reimburse respondent for its attorney fees and costs as a result of a preliminary injunction proceeding that it has been determined petitioners instituted in good

² Ironically, the Circuit Court entered this order after the parties had already agreed to stay the Town's motion for sanctions pending settlement negotiations as evidenced by an Agreed Order Staying Town's Motion for Sanctions which was signed by the Circuit Court on February 21, 2012, six days after it has entered the sanctions order. App. 1797. In other words, the Circuit Court agreed to stay its consideration of a motion upon which it had already ruled.

³ The special commissioner's report makes reference to W. Va. Code § 53-5-9, App. 1027, but that statute references the posting of an injunction bond to satisfy any "judgment . . . as may be awarded against the party obtaining the injunction, and also such damages as shall be incurred or sustained by the person enjoined, in case the injunction be dissolved . . ." Here, of course, no judgment was entered against petitioners in the injunction proceeding; attorney fees are not "damages" under the statute; and the injunction was never "dissolved," but the suit was voluntarily dismissed without prejudice to petitioners' pursuit of their damages claims.

faith and in which petitioners prevailed but voluntarily dismissed, without prejudice, in order to pursue damages claims, which are still pending. Moreover, this order was entered without requiring respondent to answer petitioners' legitimate discovery requests under *Pitrolo*; without any evidentiary proceeding at which petitioners could cross-examine respondent's questionable documentation of fees and costs allegedly incurred; and without any of the findings of fact or conclusion of law required under *Pitrolo* or the other decisions of this Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents important issues regarding (1) the due process to which non-movants are entitled when responding to a motion for sanctions in the form of attorney fees and costs and (2) whether a party who prevails in a preliminary injunction proceeding can nevertheless be sanctioned in the form of the enjoined party's fees and costs when the party ultimately decides to voluntarily dismiss the preliminary injunction in favor of pursuit of a claim for damages against the enjoined party. Accordingly, petitioners request oral argument and disposition of this case under Rule 20 of the Rules of Appellate Procedure.

V. ARGUMENT

A. STANDARD OF REVIEW

Because no legal authority has been cited by the Circuit Court for the imposition of sanctions in this case, the appropriate standard of review is somewhat elusive.

This is not a case in which a party has been sanctioned for violating a discovery order in which the standard of review is properly abuse of discretion. Syl. pt. 4, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996). Likewise, there has never been any finding that petitioners violated R. Civ. P. 11, R. Civ. P. 16, or R. Civ. 37, all of which can serve as a basis for sanctions.

Syl. pt. 1, *Bartles*. Indeed, not only are petitioners not charged with violating any court order, they prevailed in each and every substantive issue decided by the Circuit Court.

They sought a preliminary injunction to enjoin the Town from declaring a default and were awarded a preliminary injunction over the Town's objections. They sought an order compelling the Town to participate in mediation as required in the contract and mediation was ordered over the Town's objections. Eventually, they decided to pursue their claims for damages in lieu of continuing the injunction proceedings and order was entered voluntarily dismissing the preliminary injunction without prejudice to their claims for damages over the Town's objections which are still pending and in which the Town's motion to dismiss was recently denied.

All the two-page sanctions order says with respect to any justification for imposing sanctions is: "The Town of Clay is entitled to the proceeds of the injunction bond . . . as the Town of Clay has proved to this Court that it suffered such an [sic] expenses and costs resulting from Multiplex's having filed a Complaint for a Temporary Injunction, and then abandoning the Complaint before the Court could determine the merits of the Complaint." App. 1765-1766.

There is no finding of bad faith. There is no reference to the fact that the Circuit Court issued the preliminary injunction and ordered mediation, both over the Town's objections, or that the preliminary injunction was voluntarily dismissed without prejudice to the petitioners' right to pursue their damages claims which are still pending. Most importantly, not a single case is cited for the proposition that an enjoined party is entitled to sanctions when the moving party decides to pursue damages claims instead of injunctive relief, particularly where those damages claims are still pending and are unresolved. Additionally, there is absolutely no discussion of the *Pitrolo* factors or resolution of petitioners' motion to compel discovery responses and for an evidentiary proceeding.

Likewise, there is nothing in the special commissioner's report, which is incorporated by reference, that either (1) provides any legal basis for the imposition of sanctions or (2) addresses any the *Pitrolo* factors. App. 1022-1031. Indeed, in the Circuit Court's own order entered on February 1, 2012, which was prepared by the special commissioner, it states: "Multiplex has not been shown to have acted in bad faith." App. 1735.

In *State ex rel. Hicks v. Bailey*, 227 W. Va. 448, 711 S.E.2d 270 (2011), which like this case involved an appeal of an award of attorney fees, this Court applied a *de novo* standard of review because, like this case, it involved legal issues as to when attorney fees can be awarded. Likewise, in this case, petitioners submit that a *de novo* standard of review is appropriate.

B. THE TRIAL COURT ERRED IN SANCTIONING PETITIONERS WHEN IT RULED THE PRELIMINARY INJUNCTION AWARDED PETITIONERS WAS NOT OBTAINED IN BAD FAITH.

In Syllabus Point 2 of *Hicks*, this Court reiterated, "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.' Syl. Pt. 2, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986)." Thus, there is a presumption that each party, including the Town, bears its own attorney fees. Here, of course, there is no statutory, regulatory, or contractual basis for the award of attorney fees and costs.

In Syllabus Point 3 of *Hicks*, this Court likewise reiterated, "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees . . . without express statutory authorization[] when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.' Syl. Pt. 3, in part, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986)." Thus, in order to obtain one's attorney fees and costs in the absence of a statutory, regulatory, or contractual basis, it is required that (1) the movant be the winning party

and (2) the non-movant acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Here, of course, the Town was not the winning party and it was expressly found that “Multiplex has not been shown to have acted in bad faith.” App. 1735.

As previously noted, the special commissioner’s first report references W. Va. Code § 53-5-9, App. 1027, but that statute has no application to this case for a number of reasons.

First, there was never an “injunction bond” posted, but rather cash in the amount of \$2,500 was paid into Court, App. 1-5, to which the Town never objected and, accordingly, W. Va. Code § 53-5-9 has no application. See *Ballard v. Logan*, 68 W. Va. 655, 70 S.E. 558 (1911)(liability on an injunction bond does not extend beyond its terms).⁴ The Town will be

⁴ The Circuit Court’s decision to require payment of \$2,500 into court was never intended to be used to reimburse the Town for its attorney fees and expenses. Indeed, the Town did not even request a bond at the hearing to secure the preliminary injunction, which was just being issued until the parties mediated, but the only potential “damages” referenced by the Town after the hearing at a meeting in chambers were the liquidated damages under the contract:

MR. MORRIS: Your Honor, we would be happy to post a bond. We can do that forthwith. Although, quite frankly, we had estimated that the only likely harm, there was little or no monetary harm associated to the defense with our request of a, simply, status quo TRO. . . .

THE COURT: Court will permit the ten percent to be posted, cash or surety. . . .

MR. RONCAGLIONE: We would object, Your Honor. I think that that’s an insufficient amount *because of the magnitude of the work that remains*.

THE COURT: I understand.

MR. RONCAGLIONE: And on November 18 we met with them and tried to cover this.

THE COURT: Well, the problem you have is this, ladies and gentlemen, *I don’t know who is in the wrong and who is in the right at this point, and I won’t know that until I hear the case*. And the problem is that the petitioners are going to be out of business if this is permitted to go forward and they’re declared in default and then US Surety comes in and seeks indemnification in the matter. And I’m going to err on the side of caution. . . .

unable to point this Court to the language of any injunction bond, upon which it could have insisted but did not, that provides for indemnification of its attorneys fees and costs incurred in unsuccessfully opposing the preliminary injunction.

Second, where an injunction is only ancillary to the main object of the suit, which was dismissed without prejudice to petitioners, attorney fees and costs incurred in the proceeding are not recoverable from an injunction bond. *State v. Carden*, 111 W. Va. 631, 163 S.E. 54 (1932). Here, the purpose of the preliminary injunction was to maintain the status quo while the parties mediated their claims against one another and, after that mediation failed, petitioners were entitled, as was the Town, to pursue their damages claims against one another, which are still pending. How can the Town legitimately explain why it is entitled to sanctions when petitioners, for example, may prevail on a suit against the Town for the causes of action which have been dismissed in this matter without prejudice?

Third, the Town's argument, apparently accepted *sub silencio* by the special commissioner, that the voluntary dismissal of the preliminary injunction by petitioners in favor of pursuing their damages claims was somehow *res judicata* with respect to the Town's motion for sanctions, is (1) wrong factually because the Circuit Court allowed petitioners to withdraw their request for injunctive relief pursuant to R. Civ. P. 41 and never granted the Town's "Motion to Dismiss and in the Alternative to Dissolve Temporary Restraining Order" and (2) wrong legally because "Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been *a final adjudication on the merits* in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must

App. 230-232 (emphasis supplied). Of course, the issue of who is right and who is wrong still has not been determined, but is the subject of continuing litigation involving the Town, Multiplex, the Surety, the Engineer, and the Water Development Authority which is seeking to place the entire project into receivership as a result of the Town's mismanagement.

involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either *must be identical* to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997)(emphasis supplied), and there never has been a final adjudication on the merits that the Circuit Court’s issuance of a preliminary injunction was either wrongful or wrongfully obtained and the issues presented to the Circuit Court based upon the Town’s motion for sanctions are obviously not identical with issues presented in the preliminary injunction proceedings.

Fourth, the Town’s argument, apparently accepted *sub silencio* by the special commissioner, that a voluntary dismissal under R. Civ. P. 41 of a complaint for preliminary injunction is the same as dissolution of a preliminary injunction on its merits has no legal support⁵ and, moreover, there is certainly no legal support for the proposition that when an

⁵ None of the cases relied upon by the Town below support forfeiture of the injunction bond or an award of sanctions in this matter. *Meyers v. Washington Heights Land Co.*, 107 W. Va. 632, 149 S.E. 819 (1929), did not involve forfeiture of a bond or imposition of sanctions, but the validity of an injunction in the absence of a bond. *Glen Jean, Lower Loup & D.R. Co. v. Kanawha, Glen Jean & E.R. Co.*, 47 W. Va. 725, 35 S.E. 978 (1900), did not involve forfeiture of a bond, but involved the enjoined party’s remedy of malicious prosecution, which requires that the enjoined party prevailed on the substantive merits of the underlying action. In *State v. Marguerite Coal Co.*, 104 W. Va. 324, 140 S.E. 49 (1927), this Court specifically noted, “The injunction on a hearing was dissolved by the circuit court, which ruling was later affirmed by this court.” In *State v. Freshwater*, 107 W. Va. 210, 148 S.E. 6, 7 (1929), the case also arose from judicial dissolution of an injunction: “The injunction was subsequently dissolved.” In *State ex rel. Shatzer v. Freeport Coal Co.*, 144 W. Va. 178, 180, 107 S.E.2d 503, 505 (1959), the case arose from judicial dissolution, on the merits, of an injunction secured by a bond: “By the injunction, issued at the instance of the defendant Freeport Coal Company, which also claimed to be the owner of the coal, the relator was prevented from mining and removing the Bakerstown seam of coal from the foregoing tract of land during the period April 20, 1954 to April 10, 1956, when the injunction was dissolved and the claim of the defendant Freeport Coal Company to ownership of the coal was denied following a decision of this Court in the companion case of *Freeport Coal Company v. Valley Point Mining Company*, 141 W. Va. 397, 90 S.E.2d 296.”

injunction plaintiff exercises its right to voluntarily dismiss a preliminary injunction pursuant to R. Civ. P. 41 in favor of a suit for damages, the enjoined party is entitled to recover attorney fees as “damages.” Indeed, in Syllabus Point 1 of *Marguerite Coal*, this Court held, “In an action on an injunction bond, *counsel fees and expenses expended in resisting the issuing of a preliminary writ of injunction are not damages sustained from the issuance of the writ*, and are therefore not in the condition of the bond, and *cannot be taken into account in determining the amount of damages that are caused by it.*” (emphasis supplied).

Finally, in Syllabus Point 3 of *Glen Jean, Lower Loup & D.R. Co. v. Kanawha, Glen Jean & E.R. Co.*, 47 W. Va. 725, 35 S.E. 978 (1900), this Court held, “Where no bond has been required, damages are not recoverable, unless the injunction was maliciously sued out, without probable cause.” Again, in this case, there has been a specific finding that petitioners did not act in bad faith in seeking a preliminary injunction. To the contrary, the record is clear that petitioners acted in good faith.

Finally, the last case relied upon by the Town below, *State ex rel. Citizens' Nat. Bank v. Graham*, 68 W. Va. 1, 69 S.E. 301, 301 (1910), also arose out of a judicial dissolution of an injunction on the merits: “This plea made the point that the circuit court on dissolving the injunction decreed that the bank recover the amount of the two judgments with interest and costs of injunction and 10 per cent. damages as provided by statute from the date of the injunction to the date of dissolution, and that on execution the same had been paid.” The Town has relied upon no case in which a party who in good faith filed and obtained a preliminary injunction later dissolved in favor of pursuing damages claims has been assessed with the attorney fees and costs of the enjoined party. Indeed, in *Ohio River Valley Environmental Coalition, Inc. v. Timmermeyer*, 363 F. Supp. 2d 849 (S.D. W. Va. 2005), where plaintiffs, as in this case, voluntarily dismissed their case after being awarded a preliminary injunction prior to an adjudication on the merits of their claims, as in this case, the court nevertheless awarded attorney fees to the plaintiffs because they had substantially prevailed on the merits at the preliminary injunction stage. Certainly, petitioners do not mean to suggest that they should be awarded their attorney fees because they initially prevailed at the preliminary injunction phase of these proceedings, but the *Timmermeyer* case underscores that it is an adjudication on the merits that dictates which party prevailed for purposes of fee and/or cost-shifting.

On December 7, 2010, a hearing was conducted and the Circuit Court issued a preliminary injunction stating as follows:

[I] can see now that this hearing is going to take quite a long and lengthy time. Pursuant to Rule 65(a)(2) of the Rules, I'm going to consolidate the hearing with this preliminary hearing in the matter. And I'm going to, at this point, issue a temporary injunction in the matter, finding that there is immediate and irreparable injury and loss or damage that could occur to Multiplex; they would be forced into bankruptcy and there could be a potential of the assets of Art Poff and Pamela Poff being at dire circumstances. And I'm going to continue this hearing and I'm consolidating, the rules allow me to do that. I'm going to temporarily order, pending a full hearing, both the preliminary and the entire hearing in the matter, that the Town of Clay shall not declare Multiplex in default of the contract.

App. 221.

This Court Circuit recognized that the dispute between petitioners and the Town concerned the Town's failure to direct its Engineer to answer Multiplex's questions about how it was to proceed with construction: "I'm not going to address the issue of whether to order the town to issue a change order or to answer Multiplex questions; that's an issue that I will address at the hearing in this matter." Id.

The fact that legitimate questions existed at the time of the Circuit Court's issuance of a preliminary injunction is beyond dispute as the Engineer's counsel sent a letter to petitioners' counsel dated December 30, 2010, addressing some, but not all of the pending questions that precluded Multiplex from proceeding with completion of the project. App. 1159-1167.

The fact that petitioners' suit included claims for both injunctive relief and damages is beyond dispute as the Town's own attorney argued at the hearing that this Court should not issue an injunction because money damages were sufficient: "[T]hey have an adequate remedy at law; I'm not saying that they'll prevail, but they certainly have one." App. 223.

Incredibly, the Town's attorney also argued that the Circuit Court was without jurisdiction to order mediation over the Town's objections:

MR. RONCAGLIONE . . . Here, under article 16, under the dispute resolution clause, it is only if it's mutually agreeable to us, and it is not. . . .

THE COURT . . . But I'm asking you a specific question: Are you asserting that this Court does not have the authority to order mediation involving 10-C-62 in the matter.

MR. RONCAGLIONE: I think Your Honor could order mediation provided that it is in the equity jurisdiction of the court, and because they have an adequate remedy at law then I believe that jurisdictional portion of equity for this Court is nonexistent and due to their adequate remedy at law ---

THE COURT: Well, I would agree that the issues that are not included in the pleadings in this case certainly are not subject to the Court ordering mediation, but to the issues addressed in the pleadings, I believe that this Court has the inherent authority. Mediation is something that the Court does, and I can tell you that 100 percent of all civil cases in this Court get mediated; they're ordered to be mediated by me. I do not grant any exceptions, ands, ifs, or buts in the matter. . . .

MR. RONCAGLIONE: I understand that part, Your Honor. I'm just telling you, I mean ---

THE COURT: Well ---

MR. RONCAGLIONE: In terms of the general authority of the Court to order the parties to mediation, I follow that, but stepping over the issue, just so long as it's within the equity jurisdiction of the Court, I don't believe it is, because in the dispute resolution paragraph, which is article 16, under paragraph C, it specifically allows them to give written notice to the other party of their intent to submit the claim to a court of competent jurisdiction. But ---

THE COURT: Well, I've heard enough. Okay. In regard to the matter the Court believes that -- sir, you can stand down. . . . Quite frankly, and I will say this, this is a matter that needs resolution whether a mediator resolves it or whether the parties resolve it. It's not fair to the citizens of the County of Clay, that everything is stymied up in litigation and fighting.

App. 225-228.

Unfortunately, however, the parties were unable to resolve their claims against one another at mediation and petitioners decided to proceed with their damages claims against the Town. In an initial order, the Circuit Court found, “Dismissal of the Plaintiffs’ Complaint for Preliminary Injunctive Relief will not prejudice the Defendants. . . . Accordingly, Plaintiffs’ request for preliminary injunction is hereby dismissed WITH PREJUDICE, all other claims and remedies are hereby dismissed WITHOUT PREJUDICE.” App. 310. Later, the Court confirmed these findings in an order entered on February 8, 2011. App. 384.

Obviously, based upon the Circuit Court’s own findings and conclusions, petitioners acted in good faith in seeking injunctive relief when the Town was threatening termination of the contract when Multiplex could not proceed with construction because the Town was directing its Engineer not to answer questions related to completion of the contract. Consequently, after conducting a hearing on the merits of petitioners’ complaint, the Circuit Court issued a preliminary injunction and ordered the parties to mediate their disputes. Ultimately, when mediation did not produce a settlement, the injunction was not dissolved, but the petitioners voluntarily dismissed their suit under R. Civ. P. 41, which was their right, in favor of pursuing claims for damages against the Town which are still pending.⁶

As there is no legal authority for the award of attorney fees to the losing party when the winning party was not found to have acted in bad faith, including where a preliminary injunction

⁶ Likewise, the Town has asserted claims against Multiplex, including liquidated damages for the same time period as the preliminary injunction. Moreover, in a separate dispute with the Surety, it asserted similar claims resulting in the issuance of a check for nearly \$900,000 that was to compensate the Town for those delay damages and apparently for the same attorney fees and costs for which the Town is seeking double recovery, as best as petitioners can discern, in this suit. App. 1332-1333.

is voluntarily dismissed in favor of the pursuit of damages claims, the Circuit Court's order should be set aside and this case remanded with directions to enter judgment in favor of petitioners.

C. THE TRIAL COURT ERRED IN ENTERING A SANCTIONS ORDER WITHOUT AFFORDING PETITIONERS THE RIGHT TO ENGAGE IN DISCOVERY; THE RIGHT TO THE PRODUCTION OF A COPY OF ORIGINAL INVOICES AND PAYMENT RECORDS; THE RIGHT TO AN EVIDENTIARY HEARING, AND WITHOUT MAKING ANY OF THE REQUIRED FINDINGS UNDER *PITROLO*.

Petitioners repeatedly argued to the Circuit Court and special commissioner to no avail that the proceedings were being conducted in violation of this Court's repeated directives concerning the award of attorney fees and costs.

In Syllabus Point 4 of *Pitrolo*, this Court held:

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Obviously, in order to determine the reasonableness of a fee under these factors, both the tribunal and the non-moving party need to know (1) what time and labor was required; (2) what is the moving party's position regarding the novelty or difficulty of the questions; (3) what skill was required in order to perform the legal services required; (4) whether the litigated precluded the attorney from other work; (5) what is the customary fee charged by the attorney and other

attorneys in similar cases; (6) what were the fee arrangements between the moving party and its attorney; (7) what time limitations were imposed by the moving party or the circumstances; (8) what was the amount in dispute and what results were obtained;⁷ (9) what is the experience, reputation, and ability of the moving party's attorney; (10) whether the moving party or its attorney considered the undertaking of representation to be undesirable; (11) the length and nature of the professional relationship between the moving party and its attorney; and (12) the nature of awards in similar cases.

Accordingly, petitioners served discovery requests on the Town eliciting information relevant to the *Pitrolo* factors as commonly occurs in these types of cases. App. 543-575. When the special commissioner refused to compel the Town to answer these discovery requests, the petitioners made Freedom of Information Act requests to secure copies of the alleged invoices and cancelled checks. App. 940-945. When the Town refused to respond to the Freedom of Information Act requests, petitioners filed a motion with the Circuit Court to compel the Town's responses to the petitioners' discovery requests. App. 1494-1624. When the special commissioner submitted a second report even though the Town had still not complied with directives to provide appropriate documentation of the attorney fees alleged to have been paid, petitioners filed an objection to that report reiterating their request for discovery and an evidentiary hearing. App. 1755-1764.

Of course, it should come as no surprise to the Court that because petitioners were deprived of any meaningful discovery and/or any evidentiary hearing, the Town has been awarded attorney fees as a sanction without the findings this Court has required under *Pitrolo*.

⁷ Of course, the "result obtained" in this case by the Town's attorney was a rejection of the Town's arguments in opposition to maintaining the status quo pending mediation, which further underscores the inappropriateness of an award of fees and costs in this case.

In the special commissioner's first report, later incorporated by reference into the Circuit Court's order, he stated:

Multiplex argues that any award of attorney's fees in this case should be subject to review under the standards established in Syllabus Point 4 of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Multiplex is correct that the factors in *Pitrolo* should be addressed as part of the submission of the attorney's fees . . . While each factor discussed in *Pitrolo* need not be proven,⁸ the Commissioner will consider the extent to which the attorney' [sic] fees sought are reasonable The Town of Clay shall **submit a complete list of damages** it claims to have suffered The Town shall address the factors listed in *Aetna v. Pitrolo* in submitting its claim for attorney's fees.

App. 1029-1030. (emphasis in original).

Thereafter, petitioners continued to demand discovery on these factors; continued to demand an evidentiary hearing; and continued to be stonewalled by the Town. Ultimately, the special commissioner refused to respond to any of these requests or to require the Town or its counsel to simply provide the original invoices and cancelled checks for the attorney fees and costs claimed, but submitted a second three-page report discussing absolutely none of the *Pitrolo* factors, and making the following findings that only underscored the need for discovery, an evidentiary hearing, and application of the *Pitrolo* factors:

The petition for the injunction was filed on December 3, 2010. The notice of voluntary dismissal was filed on January 27 [sic], 2011. *For that reason, the invoice for fees dated March 31, 2011 . . . and covering work that was performed and expenses that were incurred significantly after the petition for injunction had been fully resolved, shall be disregarded*

Multiplex has contested the Town's list of legal expenses on the grounds that those fees are expressed in large blocks that make it difficult for an outside person to review the invoices to determine

⁸ The special commissioner's use of the term "proven" is indicative of his misunderstanding that the *Pitrolo* factors are not a test for whether attorney fees should be awarded, but the reasonableness of any attorney fees that are awarded.

their reasonableness for the task that is said to have been performed for the respective charges. *Multiplex's criticism is very well founded. . . .*

Further, there are charges for the Motion to Recover Attorney's Fees and Forfeit the bond included that are not appropriate . . .

Multiplex has also complained that the invoices are false, and possibly fraudulent, because they are billed to the mayor of the Town at a time when the mayor had not taken office . . . The Town adequately explained that issue, *which had admittedly been a concern to your Commissioner. . . .*

Counsel neglected to change the billing invoice *to make it look like the original invoice would have looked, if the original invoice from the attorney to the Town of Clay had been merely copied . . .*

App. 1749-1750. (emphasis supplied).

All of the foregoing reminds petitioner of the famous caption of the New Yorker cartoon, "Other than that, Mrs. Lincoln, how was the play?" Obviously, there were multiple, legitimate reasons to question what the Town was attempting to perpetrate. It sought fees for periods outside the pendency of the preliminary injunction. It sought fees for activities unrelated to the preliminary injunction. It sought fees for activities with no meaningful descriptions. It refused to answer simple discovery requests. It refused to answer simply FOIA requests claiming attorney/client privilege for things like cancelled checks. It refused to produce the original invoices or to explain why the original invoices were not available for production. It appeared to be attempting to recover some of the same fees from the Surety.

The Court need look no further than the 1,768-page appendix in this case involving a dispute over \$25,000 in which clearly more than \$25,000 in fees and expenses have been incurred on both sides to understand that the Town's motivation is not the recovery of any "damages" incurred as a result of a 45-day preliminary injunction to maintain the status quo so that mediation mandated under the contract could be conducted and for which the Town is

already protected by liquidated damages provisions under the contract. The Town's motivation is to financially destroy petitioners so that they will not be able to pursue their damages claims against the Town after it wrongfully directed its Engineer not to answer basic questions about proceeding with construction and then improperly terminated the contract.

As petitioners repeatedly stressed to the special commissioner and Circuit Court, this Court has repeatedly reversed and remanded cases where attorney fees have been awarded without the requisite findings and conclusions under *Pitrolo*. See, e.g., *Paugh v. Linger*, 228 W. Va. 194, 201, 718 S.E.2d 793, 800 (2011) (“The issue is remanded to the circuit court with directions to remand to the family court for entry of an order making findings of fact which would allow a court to engage in meaningful review of the award of attorney's fees.”) (citing *Pitrolo*); *Croft v. TBR, Inc.*, 222 W. Va. 224, 230, 664 S.E.2d 109, 115 (2008) (“we remand for the circuit court to determine the issue of reasonable attorney fees and costs pursuant to the factors set out in Syllabus Point 4 of *Aetna Casualty & Surety Co. v. Pitrolo*); *Horkulic v. Galloway*, 222 W. Va. 450, 465, 665 S.E.2d 284, 299 (2008) (“the lower court shall ascertain the reasonable award by reference to syllabus point four of *Aetna Casualty & Surety Co. v. Pitrolo*”); *Heldreth v. Rahimian*, 219 W. Va. 462, 470-471, 637 S.E.2d 359, 368-369 (2006) (“On remand, the trial court is to determine an award by applying the factors set forth in *Bishop Coal and Pitrolo*”); *Statler v. Dodson*, 195 W. Va. 646, 648, 466 S.E.2d 497, 499 (1995) (“we remand this case for a determination of . . . whether the amount of legal fees requested by Mr. Scales is a ‘reasonable fee’ under . . . *Pitrolo*”); *Pitrolo*, 176 W. Va. at 195, 342 S.E.2d at 161 (1986) (reversing and remanding an award of attorney's fees finding that “The trial court's failure . . . to make any findings of fact or conclusions of law regarding the calculation of the attorney's fee award gives this Court nothing upon which to base our review.”).

Moreover, this Court has repeatedly set aside awards of attorney fees due to the failure of the trial court to comply with these due process requirements.⁹ For example, in *State ex rel. Rees v. Hatcher*, 214 W. Va. 746, 749-50, 591 S.E.2d 304, 307-08 (2003), this Court stated:

The determination of whether the fees are reasonable is simply a fact driven question that must be assessed under the *Pitrolo* factors.

we have observed that “[i]n failing to accord Appellant’s counsel an opportunity to respond to the lower court’s basis for assessing fees and costs, the most basic of all protections inherent to our judicial system ha[ve] been violated.” *Czaja v. Czaja*, 208 W. Va. 62, 76, 537 S.E.2d 908, 922 (2000) (reversing the circuit court’s assessment of attorney’s fees without allowing the suffering party to argue the reasonableness of the sanctions). Quoting *State ex rel. Dodrill v. Egnor*, 198 W. Va. 409, 481 S.E.2d 504 (1996), this Court in *Czaja v. Czaja* noted that “ordinarily a party about to be sanctioned is given an opportunity to explain the default or to argue for a lesser penalty.” 208 W. Va. at 76, 537 S.E.2d at 922 (internal citations omitted).

The petitioner argues that Judge Hatcher sanctioned the petitioner without providing the petitioner with an opportunity to explain his actions. The record below shows that Judge Hatcher failed to provide the petitioner with an opportunity to respond to the assessment of sanctions.

Recently, in *Corporation of Harpers Ferry v. Taylor*, 227 W. Va. 501, 711 S.E.2d 571 (2011), this Court reiterated a non-moving party’s right to an evidentiary hearing on a request for

⁹ *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 210 W. Va. 223, 229, 557 S.E.2d 277, 283 (2001) (“We have previously determined, on numerous occasions, that a circuit court has erred by failing to afford a party notice and the opportunity to be heard prior to awarding attorney’s fees.”); *Czaja v. Czaja*, 208 W. Va. 62, 75-76, 537 S.E.2d 908, 921-22 (2000) (“In failing to accord Appellant’s counsel an opportunity to respond to the lower court’s basis for assessing fees and costs, the most basic of all protections inherent to our judicial system has been violated.”); *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 251, 332 S.E.2d 262, 264 (1985) (“Like other sanctions, attorney’s fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.”)(citation omitted).

award of attorney fees and after it became apparent that the Town was proffering questionable documents, petitioners repeatedly requested an evidentiary hearing in this case. Obviously, the Rules of Civil Procedure and, specifically, the discovery rules would apply to evidentiary proceedings and are necessary to afford litigants due process in advance of those evidentiary proceedings. *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997).

Particularly, under the circumstances of this case, the Town should have been compelled to answer petitioners' discovery requests; the Town should have been compelled to provide a copy of the original invoices and cancelled checks or explain why they could not do so; the petitioners should have been afforded an evidentiary hearing; and the Circuit Court should have followed this Court's directives under *Pitrolo* and its progeny.

Because none of the foregoing occurred, this Court should reverse the judgment of the Circuit Court of Clay County and remand with directions.

D. THE TRIAL COURT ERRED IN ENTERING A SANCTIONS ORDER BEFORE RESPONDENT HAD COMPLIED WITH THE TRIAL COURT'S OWN ORDER TO PROVIDE DOCUMENTATION REGARDING ITS ALLEGED ATTORNEY FEES AND COSTS, AND BEFORE THE PERIOD FOR PETITIONERS TO RESPOND TO THE SPECIAL COMMISSIONER'S PROPOSED SANCTIONS ORDER HAD EXPIRED. BECAUSE THE SANCTIONS ORDER WAS ENTERED UNDER THESE CIRCUMSTANCES, THIS COURT SHOULD REVERSE THE ORDER OF THE CIRCUIT COURT AND REMAND FOR FURTHER PROCEEDINGS.

One of the most perplexing aspects of this case is why the Circuit Court entered its sanctions order on February 15, 2012, despite the fact that it had signed an order on February 1, 2012, directing the Town to submit its documentation by February 24, 2012, and affording petitioners until March 12, 2012, to respond to the Town's submission. App. 1735.

Moreover, the special commissioner's report which tendered the final order to the Circuit Court was dated February 14, 2012, only one day before it was entered. App. 1747. Of course,

Trial Court Rule 24.01(c) provides, “unless the judicial officer otherwise directs, counsel responsible for the preparation and presentation of an order may submit the original of the proposed order to the judicial officer . . . with a copy to opposing counsel along with a notice to note objections and exceptions to the order within five (5) days after receipt of the proposed order or such lesser time as the judicial officer directs.”

Although petitioners served their objections to the special commissioner’s report the same day it was received by their counsel, App. 1764, it was not filed until after the Circuit Court had already signed the order, App. 1766. Indeed, as previously noted, the parties submitted an agreed order staying the Town’s motion for sanctions which was signed by the Circuit Court on February 21, 2012, App., 1767, which was after it had signed the sanctions order on February 15, 2012.

For some of the other reasons discussed, the Circuit Court’s entry of a sanctions order was precipitous, including but not limited to the fact that it was entered in the middle of the Circuit Court’s own scheduling order.

Accordingly, this Court should reverse the judgment of the Circuit Court of Clay County and remand with directions.

E. THE TRIAL COURT ERRED IN ORDERING THE FORFEITURE OF A \$25,000 INJUNCTION BOND THAT DOES NOT EXIST AND WAS NEVER POSTED BECAUSE THE TRIAL COURT PERMITTED PETITIONERS TO MAKE A CASH DEPOSIT OF \$2,500 TO SECURE THE PRELIMINARY INJUNCTION IN LIEU OF A BOND. BECAUSE THE TRIAL COURT HAS ORDERED THE FORFEITURE OF AN INJUNCTION BOND THAT DOES NOT EXIST, THIS COURT SHOULD REVERSE AND REMAND WITH DIRECTIONS THAT IF ANY PENALTY BE IMPOSED ON PETITIONERS, IT BE LIMITED TO THE \$2,500 CASH DEPOSITED BY PETITIONERS TO SECURE THE PRELIMINARY INJUNCTION.

As previously discussed, the purpose of the preliminary injunction was to maintain the status quo pending mediation which was mandated under the contract. Moreover, the contract

itself contains liquidated damages provisions providing a penalty for each day construction is delayed. Accordingly, the Town was going to suffer no “damages” during the pendency of the preliminary injunction and never requested any injunction bond at the preliminary injunction hearing.

Rather, after the preliminary injunction hearing had already concluded, the Circuit Court brought counsel back into chambers to discuss the matter of a “bond” and stated “I’m setting it for \$25,000 in this matter.” App. 230. At that point, petitioners’ counsel observed “there was little or no monetary harm associated” with the preliminary injunction. App. 231. Ultimately, it was decided that petitioners could pay \$2,500 “into the Clerk of the Court” to secure the preliminary injunction. App. 231.

Because of the limited nature of the preliminary injunction, no written order was ever entered on the preliminary injunction and no actual bond was ever posted. Rather, petitioners simply deposited \$2,500 with the Clerk of the Court and the parties unsuccessfully attempted to resolve their disputes in mediation after which petitioners voluntarily dismissed their preliminary injunction in favor of a suit for damages.

As previously noted, this Court has held that:

1. Liability on an injunction bond does not extend beyond the terms therein used, fairly construed.
2. Absolute voids in such a bond cannot be filled by insertion or addition of things which, according to law, should have been put into it, or which it is merely supposed the parties intended to include.
3. The condition of a bond, given to put into effect an injunction against a judgment, requiring the judgment debtor only to perform and discharge the orders and decrees of the court in the injunction suit, respecting the judgment, does not make the obligors liable for the judgment unless nor until a decree therefor is rendered, nor for costs in the equity suit at all.

Syl. pts. 1, 2, and 3, *Ballard v. Logan*, supra.

Here, of course, there are not “terms” to “construe” because petitioners were permitted to deposit cash instead of posting a bond and the “voids” in a non-existent “bond” cannot be “filled by insertion or addition of things which, according to law, should have been put into it,” or which the Town now, in hindsight, wishes it had demanded.

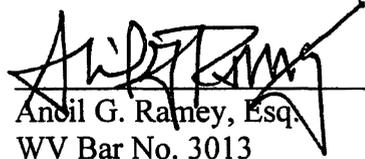
Again, the purpose of the preliminary injunction was to permit the parties to mediate the case in hopes of achieving a settlement. When that did not come to pass and the court-appointed mediator was then appointed by the Court to serve as special commissioner, a procedure which is fraught with its own conflicts, the Town should not have been permitted to retroactively and unilaterally argue that \$2,500 in cash was somehow a \$25,000 injunction bond which could be “forfeited” to reimburse the Town for its attorney fees in unsuccessfully arguing against a preliminary injunction.

VI. CONCLUSION

The petitioners respectfully request that either this Court reverse the judgment of the Circuit Court of Clay County and remand for entry of judgment as a matter of law in their favor or, in the alternative, remand this case for further proceedings to either afford petitioners their rights of discovery and an evidentiary hearing or a reduction in petitioners’ obligation to respond to the \$2,500 deposited to secure the preliminary injunction.

**MULTIPLEX, INC., a West Virginia
corporation; ART POFF; and PAMELA
POFF**

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on June 16, 2012, I served the foregoing **“BRIEF OF THE PETITIONERS”** upon counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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